IN THE IOWA DISTRICT COURT FOR POLK COUNTY

CONNIE KINNARD, Petitioner, vs. IOWA PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent, AFSCME/IOWA COUNCIL 61, Intervenor.	NO. AA 2748 RULING ON PETITION FOR JUDICIAL REVIEW

INTRODUCTION

Petitioner's Petition for Judicial Review came on for hearing November 1, 1996. Petitioner, Connie Kinnard ("Kinnard"), appeared in person and through counsel, Ray Sullins. Respondent, Iowa Public Employment Relations Board ("PERB" or "Board"), appeared through counsel, Jan V. Berry. Intervenor, AFSCME/Iowa Council 61 ("AFSCME" or "Union"), appeared through counsel, Patrick H. Payton. After reviewing the record and hearing arguments of counsel, the court enters the following:

STATEMENT OF THE CASE

Kinnard appeals to the Court from an adverse decision by the Public Employment Relations Board concerning her prohibited practices complaint filed against AFSCME/Iowa Council 61, in which Kinnard alleged the Union breached its duty to fairly represent her in a grievance proceeding. A hearing concerning Kinnard's complaint was held before Administrative Law Judge Diane Tvrdik

on August 29, 1995. In a Proposed Decision and Order filed December 8, 1995, the ALJ found that PERB was without jurisdiction over Kinnard's complaint as the complaint was not timely filed. Kinnard appealed to the full board, which overruled the ALJ's determination that the Board lacked jurisdiction, but determined that Kinnard's complaint failed on its merits. The Board refused Kinnard's request for a rehearing. She then appealed to this court, alleging numerous grounds for relief, and seeking both compensatory and punitive damages.

STATEMENT OF THE FACTS

The Board entered very detailed Findings of Fact in its Decision on Appeal filed March 27, 1996. Rather than restating the lengthy facts of this case, the Court adopts the Findings of Fact set out by the Board in its Decision on Appeal. A summary of the facts of this case follows.

Kinnard was employed by the Fifth Judicial District Department of Correctional Services ("DCS") as an Accounting Clerk II. Between June, 1993, and her termination in February, 1994, Kinnard was absent from her position approximately 35 percent of the time, apparently due to health reasons. After being absent from work with a doctor's excuse, she was to return to work on February 2, 1994. She failed to do so. Her employer sought information from her physician concerning Kinnard's condition. On February 11, 1994, Kinnard was placed on leave without pay until her physician completed a state-supplied report and she participated in the Employee Assistance Program. The physician would not supply the information without a release from Kinnard, which Kinnard refused to sign as she felt it was too broad. Kinnard's employment with the DCS was terminated on February 17, 1994, as a result of her failure to sign the release.

On February 24, 1994, Kinnard filed a grievance concerning her dismissal through AFSCME representative Doug Peters, alleging she had been dismissed without just cause. A settlement

hearing occurred on March 16, 1994, with Kinnard, AFSCME representatives Peters and Joe Crook, Kinnard's supervisor Beth Lenstra, and Jim Hancock, Director of the DCS. After 1½ to 2 hours of negotiations, during which time several proposals and counter-proposals were offered, the Union representatives reached an agreement with Lenstra and Hancock which the Union felt was favorable to Kinnard. The settlement included Kinnard's immediate reinstatement to her previous position with full back pay, upon her completion of certain conditions. Peters and Crook advised Kinnard that it was a good settlement, and that she should accept it. To their surprise, Kinnard left the meeting without doing so. She was to contact either Peters or Crook the next day to advise them of her decision. She did not contact either representative until March 24, 1994, eight days later, at which time she called Peters and asked him to negotiate an additional provision for an in-district transfer. This left Peters with the impression that Kinnard was rejecting the settlement offer.

The apparent rejection was communicated to the other Union representative, who advised Beth Lenstra, Kinnard's former supervisor. On April 25, 1994, Lenstra sent a letter to Peters requesting that Kinnard advise them in writing of her rejection. Kinnard received a copy of this letter from Peters on May 15, 1994. Kinnard made no response. Kinnard apparently did nothing to follow up on her grievance until late September, after she received a notice from AFSCME that it was withdrawing her grievance from arbitration. Kinnard finally signed the settlement offer on November 25, 1994, eight months after it was made, changing the provisions to allow her to receive back pay for the entire time since she had been terminated. On January 12, 1995, the Union advised Kinnard that her former position with DCS was no longer available and the department was not willing to rehire her. She was also informed the Union planned no further action.

Kinnard filed a prohibited practices complaint with PERB on March 2, 1995, pursuant to

Iowa Code section 20.10 (3)(A), alleging the Union failed to fairly represent her in the grievance proceeding filed on her behalf. Both the Administrative Law Judge who originally heard the case and the Board found against Kinnard, although for different reasons. Kinnard's complaint is now before the Court for a ruling.

STANDARD OF REVIEW

On judicial review of an agency action, the district court functions in an appellate capacity to apply the standards of Iowa Code § 17A.19(8) (1995). Iowa Planners Network v. Iowa State Commerce Commission, 373 N.W.2d 106, 108 (Iowa 1985). The Court has no original authority to declare the rights of the parties. Office of Consumer Advocate v. Iowa State Commerce Commission, 432 N.W.2d 148, 156 (Iowa 1988). Nearly all disputes in the field of administrative law are won or lost at the agency level. Iowa-Illinois Gas and Electric Co. v. Iowa State Commerce Commission, 412 N.W.2d 600, 604 (Iowa 1987). Judicial review of agency action is confined to correction of errors of law. Farmers Coop Oil Ass'n v. Den Hartog, 475 N.W.2d 7, 9 (Iowa App. 1991).

An agency action that is affected by an error of law or violative of constitutional or statutory provisions is subject to reversal under Iowa Code § 17A.19(8)(a) and (e). Northwestern Bell Telephone Co., supra. In deciding whether the agency made errors of law, the Court gives weight to the agency's construction of its statute but is not bound by it. Woodbine Community School District v. P.E.R.B., 316 N.W.2d 862, 864 (Iowa 1982). It is the duty of the Court to determine matters of law including the interpretation of a statute or agency rule interpreting a statute. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 10 (Iowa 1982).

Iowa Code § 17A.19(8)(f) (1995) provides that, in a contested case, the court shall grant

relief from an agency decision which is unsupported by substantial evidence in the record made before the agency when that record is viewed as a whole. Neil v. John Deere Component Works, 490 N.W.2d 80, 82 (Iowa App. 1992). Review is not de novo. Hussein v. Tama Meat Packing Corp., 394 N.W.2d 340, 341 (Iowa 1986). Evidence is substantial to support an agency's decision when a reasonable person would find it adequate to reach a conclusion even though a reviewing court might reach a contrary inference. Mercy Health Center v. State Health Facilities Council, 360 N.W.2d 808, 811-12 (Iowa 1985); Langley v. Employment Appeal Board, 490 N.W.2d 300, 302 (Iowa App. 1992). The question is not whether the evidence might support a different finding but whether the evidence supports the findings actually made. Neil, 490 N.W.2d at 82-83; Langley, 490 N.W.2d at 302. The mere possibility the record might support another conclusion does not permit the reviewing court to make a finding inconsistent with the agency finding so long as there is substantial evidence to support it. City of Davenport v. P.E.R.B., 264 N.W.2d 307, 311-12, 96 A.L.R.3d 698 (Iowa 1978).

In determining whether substantial evidence exists, the court is to consider all the evidence together, including the body of evidence opposed to the agency's review. Burns v. Board of Nursing, 495 N.W.2d 698, 699 (Iowa 1993). In considering all the evidence, including that offered in opposition to the agency's finding, the court does not compromise the limitation on its scope of review. Id. When review is not de novo, the reviewing court must not usurp the fact finding function of the agency. The agency decision should be affirmed when there is no error of law and the decision is supported by substantial evidence. Heatherly v. Iowa Department of Job Service, 397 N.W.2d 670 (Iowa 1986).

ANALYSIS

Kinnard seeks both compensatory and punitive damages, in addition to seeking a reversal of the agency's action. This Court is without jurisdiction to address Kinnard's claims for damages, including punitive damages. The Court functions in an appellate capacity only when reviewing agency actions. Even assuming, arguendo, Kinnard's claims have merit, the Court's authority is limited to reversing the Board's decision and remanding the case to the Board for further proceedings. Damages such as those Kinnard is seeking are not available in an appeal of an agency action. This Court will limit its review to whether the Board's decision violated Iowa Code section 17A.19(8) (1995).

The Board has exclusive original jurisdiction over prohibited practice complaints pursuant to Iowa Code section 20.1(2). Hearings may be conducted by an administrative law judge with appeal to the Board. Iowa Code § 20.11(2). The key issue before the Board is whether AFSCME breached its duty of fair representation in Kinnard's grievance against her employer. Such a breach is a statutory violation:

> The employee organization certified as the bargaining representative shall be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly. However, any public employee may meet and adjust individual complaints with a public employer. To sustain a claim that a certified employee organization has committed a prohibited practice by breaching its duty of fair representation, a public employee must establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith.

Iowa Code § 20.17(1) (1995).

This code section came about as a result of the United States Supreme Court decision in Vaca v. Sipes, 386 U.S. 171, 87 S.Ct. 903 (1967), where the court held a breach of the federal

statutory duty of fair representation occurred only when the union's conduct toward a member was arbitrary, discriminatory, or in bad faith. Vaca, 386 U.S. at 190, 87 S.Ct. at 916. The court went on to state that while "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration." 386 U.S. at 191, 87 S.Ct. at 917. Further, "a union does not breach its duty of fair representation, . . . , merely because it settled the grievance short of arbitration." Id., 386 U.S. at 192, 87 S.Ct. at 918. See also Norton v. Adair County, 441 N.W.2d 347, 356-57 (Iowa 1989).

A union is accorded considerable discretion in handling employee grievances. Griffin v. United Auto Workers, 469 F.2d 181, 182-83 (4th Cir. 1972) (citing Vaca, supra). See also Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 563-64, 96 S.Ct. 1048, 1056, 47 L.Ed.2d 231, (1976) (wide range of reasonableness must be allowed to bargaining representative in serving the unit it represents). Mere negligence or judgment errors in handling a grievance are not sufficient to breach the duty of fair representation. Griffin, 469 F.2d at 183, Hines, 424 U.S. at 571, 96 S.Ct. at 1059. The statutes and case law require the action be arbitrary, discriminatory, or in bad faith.

The Union entered settlement negotiations with Kinnard's employer and reached what it considered a reasonable settlement which was favorable to Kinnard. See Cert. Rec. Vol. II, Ex. H & 17. The settlement included Kinnard's immediate reinstatement with full back pay to the date of the settlement. Kinnard did not immediately accept the settlement offer. She was to call either union representative the day after the settlement was reached to advise them of her decision. Rather than doing so, she waited over a week to call, and then imposed an additional condition of a job transfer. Id., Ex. H. The Board found that Kinnard's new requirement left the union representative

with the impression that Kinnard had rejected the settlement. Id., Ex. 19, pp. 5-6. The Union determined it had completed its obligation to Kinnard by negotiating a favorable settlement. Id., Ex. H. This information was communicated to the employer, who asked that Kinnard reject the offer in writing. Kinnard received a copy of this correspondence. See Cert. Rec. Vol. II, Ex. A. Still Kinnard did not respond. Not until she received a letter in September, 1994, from AFSCME president Don McKee did she follow up on the status of her grievance. She then attempted to accept the settlement offer, amending the terms to give herself full pay for the entire time she had been off work. Id., Ex. 1. Union representative Peters then advised her that the position she had held with the DCS had been eliminated and the Department was unwilling to rehire her. Id., Ex. K.

The Board found the Union was not obligated to arbitrate Kinnard's grievance when it had already negotiated a settlement "which clearly constituted a 'win.'" Cert. Rec. Vol. I, Ex. 19, p. 14. The Board stated the Union's actions were not arbitrary, discriminatory, or in bad faith. Id., p. 15. The Board's decision was supported by substantial evidence. While the Union's communication with Petitioner left much to be desired, Petitioner has not established that the Union's actions were in any way arbitrary, discriminatory, or in bad faith. Nor, as the Board found, is there any evidence of fraud or misrepresentation. Id. at 14. Not every grievance will be resolved to all parties' satisfaction. The Union did not ignore Kinnard's grievance or handle it in a perfunctory manner. The Union negotiated a good settlement for Petitioner. The fact that she did not accept it does not increase the Union's responsibility.

The fact that the Union did not arbitrate Petitioner's grievance does not mean it breached its duty of fair representation. Petitioner had no absolute right to have her grievance arbitrated. Vaca, supra. The Union has broad discretion in handling grievances. It was not required to arbitrate

Kinnard's grievance where it had reached a favorable settlement. Kinnard had been offered immediate reinstatement to her position. She did not communicate her acceptance of the offer to the Union as requested or return to work. Petitioner could not just sit on her hands and expect other parties to handle everything for her. She had a responsibility to at least follow up concerning the status of her reinstatement, especially if her intent was to accept the settlement offer. Particularly after receiving a copy of her employer's April 25, 1994, letter which indicated the employer thought Kinnard had rejected the settlement offer, Kinnard should have been concerned about the status of her grievance. There was ample evidence in the record to support the Board's finding that the Union's actions were not arbitrary, discriminatory, or in bad faith.

Petitioner also alleges the Board's decision is affected by other errors of law. The Board addressed Petitioner's claim on the merits. It did not dismiss her action based on jurisdictional grounds as did the ALJ's earlier decision. The Board found the Petitioner had not established that the Union's actions were arbitrary, discriminatory, or in bad faith. This is the appropriate standard as set out in the statute. The Board's decision is not affected by other errors of law.

As the Board's decision is supported by substantial evidence and unaffected by other errors of law, the March 27, 1996, Decision on Appeal of the Public Employment Relations Board should be affirmed. Petitioner's Petition for Judicial Review should be dismissed. Any allegations made by Petitioner which are not directly addressed in this option have been reviewed by the court and deemed to be without merit.

RULING

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT the March 27, 1996, Decision on Appeal of the Public Employment Relations Board is affirmed. Petitioner's Petition for Judicial Review is dismissed.

Costs are taxed to Petitioner.

Ordered this 31st day of December, 1996.

Donna L Paulsen
DONNA L. PAULSEN, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

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